IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.612 OF 2004
IN
WRIT PETITION NO.7503 OF 2003

Shri Suresh J. Khade,)
Age 54 years, Beedi Shop No.935,)
Vikroli Park Site, Hanuman Nagar,)
Lal Batti, Mumbai - 400 079.).. Applicant (Org.Respondent)

Versus

M/s.New Maharashtra Repairing Works,)
Azad Nagar No.2, Castle Mill,)
Mumbai-Agra Road, Thane - 400 601.).. Respondent (Org.Petitioner)

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Shri Indrajeet R.Kulkarni for the Applicant.

Shri S.N.Deshpande for the Respondent.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 3rd December, 2004.

Oral Judgment :

1. Heard the learned advocates for the parties. Perused the records. Rule. By consent, the rule is made returnable forthwith.

2. This is an application under Section 17B of the Industrial Disputes Act, 1947, hereinafter called

as "the said Act". By the impugned award dated 27th June, 2003 passed in Reference (IDA) No.172 of 1991 by the Labour Court at Thane, the respondent was directed to reinstate the applicant in the service with continuity in the service and full back wages and all the benefits from 20th July, 1990 as well as the last drawn wages at the rate of Rs.1980/- per month. The respondent herein has challenged the award by the said Writ Petition No.7503 of 2003 and by the order dated 28th November, 2003, while issuing the rule, the execution of the award has been stayed.

3. It is the case of the applicant in this application that he is not gainfully employed anywhere and it has become difficult for himself to survive without any means and therefore appropriate relief be granted in terms of the said provision of law. The application has been objected by the respondent i.e. the petitioner in the said Writ Petition, on three counts, viz. (i) the applicant is gainfully employed and is doing a job work of carrying out car seat repairs, (ii) that the application has been filed against a wrong party and not against the petitioner in the Writ Petition and (iii) that the business of the respondent has been closed since September, 2003 and therefore, there is no question of grant of any

relief against the respondent under Section 17B of the said Act.

4. Upon hearing the learned advocates for the parties and on perusal of the records, the first point which arises for consideration in the matter is as to whether the applicant is gainfully employed or not so as to consider his application for relief under Section 17B of the said Act. Undoubtedly, there is a categorical statement on oath by the applicant that he is not gainfully employed any where and therefore the relief in the nature of wages comprised under Section 17B of the said Act may be ordered to be paid to the applicant. The said statement has been denied by the respondent in the affidavit in reply filed in the matter further stating that the applicant is engaged in car seat repairing work and he takes the same on job basis and earns about Rs.3,000/- per job from the car owners. The said claim of the respondent has been refuted by the applicant by filing the affidavit in-rejoinder in the matter. The respondent however has filed sur-rejoinder reiterating its contention about self-employment of the applicant in relation to the car seat repairing work and has sought to rely upon the certain certificates stated to have been issued by the workshop or garage owners, which are

instrumental in procuring such work to the applicant. There are about 7 such certificates placed on record along with the sur-rejoinder.

5. The contention that the applicant has been gainfully employed during the pendency of the proceedings before the Labour Court was sought to be raised by the respondent, however, the same was rejected by the Labour Court with the observation that the Opponent was not able to bring the evidence in that regard on record, and therefore, the opponent was directed to pay full back wages to the applicant while directing his reinstatement in the service.

6. Referring to the averments in the affidavit in reply that the alleged job work is being carried out by the applicant for more than last 10 years along with the vegetable business, and contention in that regard having been rejected by the Labour Court, it is sought to be argued on behalf of the applicant that no value can be attached to such statement as the respondent has failed to establish the said claim before the Labour Court and the same story is being repeated in the affidavit in reply without any further evidence in that regard being placed on record. According to the learned advocate for the applicant,

the certificates sought to be produced on record are not supported by any affidavit of any of the garage or workshop owners, besides being that all the certificates are stereo-typed certificates. In the course of argument, while disputing the contention sought to be raised on behalf of the applicant, the learned advocate for the respondent has also produced three photographs as stated to be disclosing the applicant to be engaged in the business of sale of vegetables.

7. As regards the contention of the respondent that the applicant is engaged in permanent business of sale of vegetables, as rightly submitted by the learned advocate for the applicant, there is absolutely no evidence led in support of such contention. Undoubtedly, the contention was sought to be made good by producing three photographs in the course of arguments before this Court. At the outset, it is to be noted that the respondent has not come out with any affidavit describing the details of the photographs produced in the course of arguments. It is not known as to where and when the said photographs were clicked nor there is anything on record to disclose the identity of the place in respect of which the said photographs were clicked. There is also

nothing on record to disclose any identity about the persons who are seen in the said photographs nor there is anything on record to establish the exact nature of activities being carried out by the persons who are seen in the photographs. Being so, the photographs by themselves can, by no stretch of imagination, be held to be material piece of evidence in support of the contention of the respondent that the applicant is engaged in the business of sale of vegetables. Undisputedly, there is no other material on record to support the contention of the respondent about the applicant being engaged in the vegetable sale business.

8. As regards the contention that the applicant is engaged in the car seat repairing work, and that he earns about Rs.3,000/- per job from the car owners, there has been no evidence produced in that regard by the respondent, apart from mere claim in that regard. As regards its own statement in that regard, no value can be attached to the same as neither the affidavit in reply nor the sur-rejoinder discloses as to whether any person on behalf of the respondent had any time witnessed the applicant doing any such work at any place. In other words, the affidavit filed by the respondent does not disclose personal knowledge about

the applicant being engaged in any such work or business. The statement regarding the applicant having been engaged in such work appears to have been made solely on the basis of the so called certificates placed on record along with the sur-rejoinder.

9. As regards the alleged certificates, as rightly submitted by the learned advocate for the applicant, they are virtually the stereo-typed certificates and they read thus:-

> "I the undersigned Proprietor of M/s.....herein state that Shri Suresh J. Khade is often coming to our workshop inquiring about ‘Car Seat Repairing Work’ and whenever such work is available, we inform him about the same which he does on job work basis and is either paid directly by the Car Owner or through us. He is earning in the range of Rs.2,500/- to Rs.3,500/- per job."

The certificates appear to have been typed on the letter-heads with different names. They also appear to have been signed by the different persons. However, none of the garage or the workshop owners have come forward to file any affidavit in support of

any such certificates. There is even not a statement in the affidavit in reply filed by the respondent that the deponent is able to identify the signature on any of the alleged certificates. The affidavit also does not disclose any statement that the respondent knows any of the garage or workshop owners who have issued such certificates. A categorical statement in the affidavit in reply regarding such income is to the effect that the applicant earns a sum of Rs.3,000/- approximately per job from "the car owners". None of the certificates disclose the name of any of the car owners. In fact, no value can be attached to any of the certificates. In fact, they cannot be called as certificates. Being so, there is absolutely no material on record to arrive at the finding that the applicant is either engaged in the vegetable business or he is doing the work of car seat repairing or that he earns any amount on account of any such business or work.

10. Undoubtedly, it is primararily for the applicant-worker to make out a case about he being unemployed and only thereupon the onus would shift upon the employer to prove the said fact. However, in a case where the employer comes with a specific plea that the worker is engaged in a business and earns a

particular amount on account of such business or work, and it being within the knowledge of the employer, it would be for the employer to establish such plea with cogent evidence. In the case in hand, the applicant has made a categorical statement that he was not employed anywhere and it has become very difficult for him to survive without any means. The applicant in that regard was already armed with the finding in his favour by the Labour Court in the impugned award. In the background of these facts, when it was the case of the respondent that the applicant is engaged in the vegetable business and further he is doing car seat repairing work and thereby earns Rs.3,000/- per job in addition to Rs.250/- per day from the vegetable business, it was necessary for the respondent to place on record some evidence in support of such contention. The respondent having totally failed in that regard and the applicant having discharged his burden primararily to establish about the fact of his un-employment, undoubtedly, as far as the ingredients of Section 17B of the said Act are concerned, there is a clear case made out for grant of relief in favour of the applicant.

11. The respondent, however, has raised three objections for grant of such relief. One of the

objections is regarding the application being against the wrong person or in the wrong name. The contention of the learned advocate for the respondent in that regard is that the petitioner in the Writ Petition is "M/s.New Maharashtra Auto Repowering Works", whereas the applicant discloses the name of the respondent to be the M/s.New Maharashtra Repairing Works" and he further submitted that inspite of the said wrong reference to the petitioner being disclosed in the affidavit in reply, the applicant has not bothered to seek necessary amendment in the matter. Once it is apparent that the application has been filed in the Writ Petition No.7503 of 2003, mere mistake in the cause title while describing the identity of the original petitioner, that cannot be a ground to refuse the relief under Section 17B of the said Act. The objection in that regard is purely of a technical nature and the same has to be rejected.

12. The second objection relates to the contention for grant of relief under Section 17B of the said Act would virtually amount to a disposal of the writ petition itself. Undisputedly, any relief which is to be granted under Section 17B is a relief during the pendency of the petition and it does not relate to final pronouncement of the judgment in relation to the

rights of the parties to the proceedings. Merely because such a relief is granted, that would not amount to deciding the issue in the petition itself. The very object behind the Section 17B of the said Act is to grant relief to the party to the proceedings in the nature of subsistence allowance which is otherwise available to the employee on he being suspended during the pendency of the inquiry against him. Once the Labour Court has come to a finding about the entitlement of the applicant for reinstatement, and the applicant having satisfied the Court that he is not gainfully employed even after the award has been passed, certainly, merely because the relief is granted under Section 17B, it would not amount to arrive at any final decision on the rival contentions canvassed by the parties in the Writ Petition. It is merely an interim arrangement during the pendency of the Petition.

13. As regards the third objection about the closure of the business, the learned advocate for the respondent has sought to place reliance in the decisions in the matter of **Hind Rectifiers Ltd. v. Presiding Officer, 1st Labour Court, Bombay & Anr.,** reported in 2001 I CLR 609, in **Hooghly Printing Co.Ltd. v. State of West Bengal & Ors.,** reported in

2004 III CLR 794, while contending that once the establishment is closed, the question of grant of any such relief does not arise at all. None of the decisions relied upon by the respondent support the said statement on behalf of the respondent. In **Hind Rectifiers Ltd.'s case (supra),** it was held that the provisions of Section 17B of the said Act are subject to the conditions of the employment and they do not cross the limit laid down by the conditions of service i.e. the age of superannuation. What was held therein was that, once the employee had attained the age of superannuation, he cannot still insist for benefits which an employee would be otherwise entitled to, while in the employment by taking recourse under Section 17B of the said Act during the pendency of the proceedings against such person. In the case in hand, it is nobody's case that the applicant at any time had attained the age of superannuation.

14. In **Hooghly Printing Co.Ltd.'s case (supra),** a Writ Petition was filed by the company challenging the award of the Tribunal rejecting its decision to roll back retirement age from 60 to 58 years and therein three workers had filed the applications for relief under Section 17B of the said Act. It was held therein that the said section has been introduced by

the legislature obviously for the welfare and benefit of the workman because of the pendency of the litigation before the High Court or the Supreme Court. The object behind the introduction of the said provision is that the morale of the workman is not broken down because of the long pendency of the litigation against the workman and the date of initiation of grant of relief must be, therefore the date of filing of the writ petition. While dealing with the issue of what would be the date of ending, it was held that the date of ending would be the date of retirement or the date of disposal of writ petition, whichever is earlier inasmuch as after the retirement there does not exist any employer-employee relationship and the workman also does not remain a workman under the company. It was also observed that the company was required to pay full wages drawn i.e. net wages which the workman could have taken or could have been allowed by the respondent at the time of termination and the wages which the workman could have taken home on the date of termination. One fails to understand how this judgment can be of any help to the respondent to justify the contention regarding non-liability of the respondent on the ground of closure of the establishment. In any case, mere contention about the closure of the business would not

entitle the employer to deny the benefit to the workman under Section 17B of the said Act. The learned advocate for the applicant in that regard is certainly justified in placing reliance in the decision in the matter of **Commandant, Defence Security v. Secretary, N.C.C.G.U.E. Association,** reported in 2001(90) FLR 435 wherein the Division Bench of Kerala High Court, after considering the various relevant decisions in relation to the liability of the employer under Section 17B of the said Act, had laid down certain guidelines to be followed while dealing with the application under Section 17B, and it was held that "the workman is entitled to receive the last drawn wages during the pendency of the proceedings challenging the award in the High Court or the Supreme Court even if the establishment had been closed during the period of the pendency of the proceedings." No case is made out to take a different view on the point.

15. For the reasons stated above, therefore, none of the objections sought to be raised on behalf of the respondent for grant of relief under Section 17B of the said Act are of any substance, and therefore, the same are liable to be rejected.

16. As the applicant has clearly made out a case for not being gainfully employed even after the impugned award was passed, the application needs to be allowed and the applicant is entitled for relief in terms of Section 17B of the said Act, and the respondent is liable to pay the last drawn wages since the date of filing of the application to the applicant i.e. October last. The rule is made absolute in above terms with no order as to costs.

17. At this stage, the learned advocate for the respondent prays for stay of the operation of the order passed today in this civil application. I do not find any justification for grant of stay of the operation of this order, and therefore, the request for stay of the order passed today in this civil application is rejected.